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No. 503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Appellant,

v.

PENN-OLIN CHEMICAL COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR APPELLEES

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April 15, 1964

INDEX

	PAGE
Questions presented	1
Statement	2
Competition before Penn-Olin	3
The background and formation of Penn-Olin	4
The increase in competition since Penn-Olin	6
The decision of the district court	8
Summary of Argument	8
Argument:	
I. The formation of Penn-Olin will not lessen competition in the southeastern sodium chlorate market	10
1. It is not reasonably probable that Pennsalt and Olin would both have entered the market if Penn-Olin had not been formed	12
2. There is no evidence to show a reasonable probability that, if either Olin or Pennsalt had entered the market, the other would have remained a significant potential competitor	17
3. There is no evidence that the entry into the market of either Pennsalt or Olin alone would have resulted in greater competition than was produced by Penn-Olin	18
II. Section 7 of the Clayton Act is not applicable to the creation of a new enterprise	23
III. The formation of Penn-Olin did not violate Section 1 of the Sherman Act	26
Conclusion	28
Appendix	29

TABLE OF CITATIONS

PAGE

STATUTES:

Clayton Act, § 7, 38 STAT. 731 (1914), as amended, 15 U. S. C. § 18 (1958) ..... Passim

Federal Trade Commission Act, § 5(a), 38 STAT. 719 (1914), as amended, 15 U. S. C. § 45(a) (1958) 27

Sherman Act, § 1, 26 STAT. 209 (1890), as amended, 15 U. S. C. § 1 (1958) 9, 10, 26, 27

DECISIONS:

Aluminum Co. of America v. *FTC*, 284 Fed. 401 (3d Cir. 1922), *cert. denied*, 261 U. S. 616 (1923) 24

Brown Shoe Co. v. *United States*, 370 U. S. 294 (1962) 10, 21, 23, 24, 26

FTC v. *Motion Picture Advertising Serv. Co.*, 344 U. S. 392 (1953) 27

FTC v. *Western Meat Co.*, 272 U. S. 554 (1926) .. 24

Northern Pac. Ry. v. *United States*, 356 U. S. 1 (1958) 27

United States v. *Columbia Steel Co.*, 334 U. S. 495 (1948) 27

United States v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957) 26

United States v. *El Paso Natural Gas Co.*, No. 94, 1963 Term, U. S., April 6, 1964 ..... 10, 22

United States v. *First Nat'l Bank & Trust Co.*, No 36, 1963 Term, U. S., April 6, 1964 27

United States v. *Philadelphia Nat'l Bank*, 374 U. S. 321 (1963) 10

OTHER:

Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 A. B. A. SECTION OF ANTITRUST LAW REPORT (April 1958) 21

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Questions Presented

Pennsalt Chemicals Corporation (Pennsalt) and Olin Mathieson Chemical Corporation (Olin) jointly formed Penn-Olin Chemical Company (Penn-Olin) to produce and sell sodium chlorate in the southeastern United States.

I. Does the formation of Penn-Olin violate Section 7 of the Clayton Act solely because Pennsalt and Olin had each seriously considered and were capable of independent entry into the southeastern sodium chlorate

market, notwithstanding the undisputed findings of the district court that

(a) there was no reasonable probability that but for Penn-Olin both Pennsalt and Olin would have entered the market separately; and

(b) the effect of the formation of Penn-Olin was to increase competition in the relevant market?

II. Does Section 7 of the Clayton Act apply where two corporations form a third to engage in a new enterprise?[1]

III. Does the formation of Penn-Olin violate Section 1 of the Sherman Act?

Statement

Penn-Olin is a new entrant in a market long dominated by two well-entrenched producers. Before Penn-Olin, competition was stagnant. Since Penn-Olin, competition has been vigorous. Yet appellant challenges the formation of Penn-Olin as anti-competitive.

The facts are not in dispute. They are fully stated in the district court's own findings, which appellant accepts and agrees "are amply supported by the record" (GB 28[2]). In February 1960 Pennsalt and Olin agreed to form a jointly-owned corporation to produce and sell sodium chlo-

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[1]Appellees believe this Court need not—as the court below did not—reach this question. Accordingly, it is treated in part II of the argument in this brief.

[2]"GB" refers to the Government's brief to this Court, page citations without a prefix and followed by "a" to the opinion of the district court printed in the appendix to appellant's jurisdictional statement ("JS"), "R." to the printed record in this Court, "PX" to plaintiff's (appellant's) exhibits, and "DX" to defendants' (appellees') exhibits.

rate in the southeastern United States. That agreement followed a two-year period of joint exploration of that market by the two companies. Thereafter Penn-Olin was formed, a sodium chlorate plant was built at Calvert City, Kentucky, and in September 1961 production began at the new plant.

Competition Before Penn-Olin

Admittedly sodium chlorate is the only product and the southeastern United States the only geographical market relevant to this case. Prior to Penn-Olin, two major chemical companies, Hooker Chemical Corporation (Hooker) and American Potash & Chemical Corporation (American Potash) "had a virtual monopoly in the southeast" (34a). They held over 90% of that market. "No new firms had entered the industry in the previous decade; prices were stable; and little effort had been made to expand existing uses or to develop new ones" (GB 8-9, record references omitted).

Since about 1900 Hooker (including its predecessor, Oldbury Electro Chemical Company) has been the largest producer and seller of sodium chlorate in the United States (9a-12a). The plant which it constructed at Columbus, Mississippi, in 1954 was the first sodium chlorate plant in the Southeast (9a-10a). Hooker had a large sales force accustomed to serving the southeastern market (R. 73), and especially the pulp and paper industry which purchased more than 80 per cent of the sodium chlorate sold in that market (84.1 per cent in 1960, 17a n. 8). Hooker also had a technical service force to serve that market (R. 80, 663-64) and the Rapson process for using sodium chlorate to generate chlorine dioxide for bleaching pulp and paper (PX 378, R. 939-40).

American Potash's predecessor began sodium chlorate production in 1941, and in 1958 American Potash built at Aberdeen, Mississippi, the second plant in the Southeast (10a, 22a). To gain entry into that market, American Potash entered into an arrangement with Allied Chemical Corporation (Allied Chemical) whereby Allied Chemical, which had a "large sales force and large technical service facilities" and its own process for generating chlorine dioxide (10a-11a), became exclusive sales agent for American Potash.

Pennsalt had produced sodium chlorate at Portland, Oregon, since 1941 and sold it principally west of the Rockies (11a). As the court below found, Pennsalt could not "compete effectively" for business in the Southeast (24a).

When Penn-Olin was formed there were no other domestic producers of sodium chlorate and imports were insubstantial (16a, 29a n. 19).

The Background and Formation of Penn-Olin

Pennsalt's consideration of a sodium chlorate plant in the Southeast began in 1951 (35a), but by late 1957 the management of Pennsalt, after careful analysis of the southeastern sodium chlorate market, decided it was unlikely that Pennsalt would approve construction of a southeastern chlorate plant on its own (PX 102, R. 692-93).[3] While Pennsalt had extensive experience in the commercial production of sodium chlorate, it did not have any substantial sales contact with the pulp and paper industry in the Southeast. Olin, on the other hand, had never engaged in commercial production or sale of sodium chlorate, but was

[3]Pennsalt's consideration of a separate southeastern sodium chlorate plant is discussed more fully at pp. 12-14, *infra*.

actively engaged in selling other chemicals to the pulp and paper industry (12a, 26a). It owned the Mathieson process for using sodium chlorate to generate chlorine dioxide to bleach paper and had authorized Pennsalt to use that process (11a, 13a n. 5). Having determined that building its own southeastern plant was unlikely, Pennsalt proposed to Olin an exploratory arrangement under which Olin would try to sell to southeastern pulp and paper mills (47a-48a) up to 2,000 tons of Pennsalt's temporary excess production of sodium chlorate. Early in 1958 when Pennsalt and Olin started their joint test of the southeastern market (48a) they "were far removed from the point of becoming actual competitors" (51a).

After it embarked on that arrangement, Olin also gave serious consideration to the possibility of building its own sodium chlorate plant in the Southeast. Olin's management considered and rejected such a proposal in April of 1959.[4]

The market testing arrangement was followed, early in 1960, by negotiations which resulted in the signing of a joint venture letter of intent on February 11, 1960 (5a; PX 175, R. 736-39). Penn-Olin was formed as a Delaware corporation on February 25, 1960 (5a; PX 176, R. 753), and Olin and Pennsalt each were issued one share of its capital stock on March 22, 1960 (PX 317, R. 901; see GB 31 n. 8). Penn-Olin thereafter constructed a 26,500 ton plant which was comparable in size to the existing southeastern plants of Hooker and American Potash. Pennsalt provided its technical know-how and experience in the manufacture of sodium chlorate and was given responsibility for operating the Penn-Olin plant (26a-28a). Olin, given responsibility for sales, provided its chlorine dioxide experience, its technical services, and its sales force to sell the production of the plant to the southeastern pulp mills (27a-28a).

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[4]Olin's consideration of a separate southeastern sodium chlorate plant is discussed more fully at pp. 14-16, *infra*.

The Increase in Competition Since Penn-Olin

The formation of Penn-Olin early in 1960 not only added a strong third competitor to a market then dominated by Hooker and American Potash, but it stimulated the competitive activities of those two producers.

After Penn-Olin was announced, Hooker increased the capacity of its Mississippi plant by approximately 3,000 tons per year (31a) and American Potash nearly doubled the capacity of its southeastern plant (31a).

Moreover, reacting to the entry of Penn-Olin into the market, Hooker and American Potash "attempted to make themselves more formidable as business rivals" (31a). Hooker "employed a new salesman who was a specialist in pulp and paper sales, and installed a pulp and paper research laboratory for its customers. It offered its customers five-year contracts guaranteeing them a firm price during the contract period. It also proposed to increase its selling efforts generally." (31a) American Potash began to offer similar five-year contracts to its customers (31a).

Appellant's own witness, a sales manager of American Potash, testified that there has been no lessening in competition since Penn-Olin and that he knew of no facts likely to lead to a lessening in the future (42a; R. 121-22). And no witness testified that there was any chance that Penn-Olin would lessen competition.

Furthermore, Penn-Olin demonstrably did not foreclose other entries; it was followed into the Southeast market by a fourth producer. In July 1961 Pittsburgh Plate Glass Company (PPG), which the court below found "capable of competing effectively with Penn-Olin or anyone else" (31a; see 43a), announced that it would build a 15,000 ton per year sodium chlorate plant at Lake Charles, Louisiana (12a). PPG has "large technical service, sales, market research, and laboratory forces already serving the

southeastern pulp and paper industry" (12a) and experience gained from operating a plant in Canada which uses PPG's own process for manufacturing sodium chlorate (R. 238-43).[5]

As the result of the entry of Penn-Olin and PPG and the expansion of capacity by Hooker and American Potash, the district court found that "[a]ctual and in-prospect production in the southeast will have more than doubled since the joint venture was entered into, as shown by the following tabulation:

"Company and plant location	Capacity in Tons 1959	Capacity in Tons Projected 1962[6]
Hooker		
Columbus, Miss.	29,150	32,000
AmPot		
Aberdeen, Miss.	12,000	22,500
Penn-Olin		
Calvert City, Ky.		26,500
PPG		
Lake Charles, La.		[1]15,000
Total	41,150	96,000

[1]To be achieved gradually on a stepped-up basis." (43a)

Prior to Penn-Olin, Hooker and the American Potash-Allied Chemical combination had a virtual monopoly of the southeastern market (34a). Penn-Olin was the significant new entrant needed "to challenge the supremacy of [the] two companies which were dominating" the market (27a-28a), and its entry has increased the vigor of competition.

[5]Also in July 1961 Pacific Engineering & Production Company of Nevada announced that it would construct at Henderson, Nevada, a sodium chlorate plant with a capacity of 5,000 tons per year. This plant was to be financed by a $2.4 million loan from American Cyanamid Company, which received options to use Pacific's processes and to acquire all of its assets or 50% of its stock (12a).

[6]The trial ended and the record was closed in November 1961.

The Decision of the District Court

The district court found that it was not reasonably probable that both Pennsalt and Olin would have entered the southeastern sodium chlorate market. The court reasoned that the most favorable assumption from the Government's viewpoint was that one of the two companies, but not both, would have entered the market if Penn-Olin had not been formed (39a). Even on the basis of that assumption, the lower court found nothing to suggest that the competition resulting from the entry of Penn-Olin probably will be less vigorous than the competition which would have resulted if either Pennsalt or Olin had entered on its own (41a-42a). The court concluded that "[t]he advent of Penn-Olin, and later PPG . . . will in all likelihood increase the competition which theretofore existed and bring to buyers of sodium chlorate and to the public the benefits which normally result therefrom." (43a) Accordingly, it held that the formation of Penn-Olin does not violate Section 7 of the Clayton Act, and *a fortiori* does not violate Section 1 of the Sherman Act (6a-7a; 44a).

Summary of Argument

I. Under Section 7 of the Clayton Act the issue is whether the formation of Penn-Olin will, as a reasonable probability, substantially lessen competition in sodium chlorate in the southeastern United States. There is no evidence to support appellant's claim that it will. On the contrary, the uncontroverted evidence and findings show that Penn-Olin has increased—not lessened—such competition.

Prior to Penn-Olin, two long established producers, Hooker and American Potash, dominated a stagnant market which no new competition had entered for a decade. Pennsalt was not able to compete effectively in the Southeast from its Oregon plant. Olin had never produced sodium

chlorate commercially. Pennsalt and Olin each had considered a plant of its own, but found the projected return on investment unattractive. There was no reasonable probability that both Pennsalt and Olin would each have constructed a plant in that market.

For a two year period Pennsalt and Olin jointly explored the market. Then, in February 1960, they formed Penn-Olin, which built a new plant in the Southeast. Penn-Olin not only resulted in the creation of a new competitive facility, but was promptly followed by expansion of the existing facilities of Hooker and American Potash, more aggressive selling by both of them, and the entry of PPG.

Against the positive increase in competition which resulted from Penn-Olin, appellant offers the theory that, without Penn-Olin, either Pennsalt or Olin would have entered the market and the other would have remained a potential competitor. That, appellant asserts, would have increased competition more than did Penn-Olin. But the record contains no evidence to show (a) that either company would have continued to be interested if the other had entered the market, (b) the effect upon competition of such speculative possibilities, or (c) any basis for comparing that effect with the actual increase in competition which resulted from Penn-Olin.

II. Section 7 of the Clayton Act is applicable when one corporation acquires "another corporation engaged also in commerce". Penn-Olin had not engaged in commerce, nor did it acquire any assets that had been so engaged, and therefore Section 7 is not applicable. That section was never intended to, and does not, reach the creation of an entirely new business enterprise.

III. If Section 7 of the Clayton Act is not applicable, the legality of Penn-Olin must be tested under Section 1 of the Sherman Act. When applied in a case such as this,

that section is narrower in scope than Section 7 of the Clayton Act. Therefore, if the effect of Penn-Olin on competition would not violate Section 7, it does not violate Section 1.

Argument

I

THE FORMATION OF PENN-OLIN WILL NOT LESSEN COMPETITION IN THE SOUTHEASTERN SODIUM CHLORATE MARKET.

The issue under Section 7 of the Clayton Act is whether the formation of Penn-Olin will, as a reasonable probability, lessen competition in the production and sale of sodium chlorate in the southeastern United States.

It is important to recognize at the outset that this case is fundamentally different from an "amalgamation" or "merger" of two actual competitors, as in *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321 (1963), and in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), and also from the situation where an actual competitor seeks to protect its market by acquiring a potential competitor which is already a "substantial factor" in the same market, as in *United States* v. *El Paso Natural Gas Co.*, No. 94, 1963 Term, U. S., April 6, 1964, at 7. In each of those cases the challenged merger or acquisition resulted in the removal of a competitor from the relevant market; none dealt with the formation of a new competitor and its entry into the market.

In contrast, the present case requires a determination of the actual and probable future effect on competition of the entry into the market of a new competitor. The question, therefore, is whether appellant has established that the level of competition resulting from the entry of Penn-Olin is likely to be substantially less than the level of competition

that probably would have prevailed but for Penn-Olin. As appellant puts it, "the issue as to substantial lessening of competition depends upon a comparison between the state of competition with Penn-Olin as an active competitor in the relevant market and what probably would have occurred without the joint venture." (GB 28)

Faced with specific findings and uncontradicted evidence that the entry of Penn-Olin into the southeastern sodium chlorate market increased competition, appellant's claim is reduced to the contention that Penn-Olin did not increase competition by a sufficient amount. In appellant's view, Penn-Olin should be enjoined, not because it lessened competition, nor because it was likely to lessen competition in the future, but rather because the increase in competition brought about by its formation *might* be less than *might* have resulted if Penn-Olin were not in existence.

Thus, appellant recognizes (GB 25, 28-29) that its contention requires proof of compound probabilities:

(1) The "reasonable probability that, but for the joint venture," either

(a) both companies would have entered the southeastern market, or

(b) one would have entered while the other "would have had a significant impact on the market as a potential competitor"; and

(2) The reasonable probability that either alternative "would furnish more competition than the joint venture".[7]

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[7]Appellant then proceeds, however, to argue on the basis of speculative possibilities rather than probabilities, referring to its suggested alternatives to the joint venture not in terms of probabilities, but merely as "a real possibility" (GB 27).

1. It is not reasonably probable that Pennsalt and Olin would both have entered the market if Penn-Olin had not been formed.

The first alternative posited by appellant is that both Olin and Pennsalt would have entered the market but for Penn-Olin (GB 25, 35). That contention was rejected by the trial court (39a).

Each company had considered entering the market and had made various cost, marketing, and technological studies, but every time the management of each company concluded that a southeastern plant was not sufficiently attractive (34a-36a). Pennsalt's standard for new investments requires a projected return of approximately 30 per cent before taxes (PX 339, R. 916; R. 328-32); Olin's standard requires a projected return of at least 10 per cent after taxes (R. 135). Although each company would have preferred to enter the market alone (R. 170-73, 267, 337-38), the projected returns, when realistically viewed by the management of each company, never measured up to these standards.[8] The joint venture, with its larger plant, showed a projected return to Pennsalt of 31 per cent before taxes on its net investment (PX 257, R. 852) and to Olin 10.1 per cent after taxes on its gross investment (PX 402, R. 1238; DX 42, R. 1535), thus meeting the rate of return standards of both companies.

Pennsalt

Starting in 1955 Pennsalt made several cost and market studies of a sodium chlorate plant in the Southeast (35a).

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[8]Appellant's comparisons of projected rates of return from proposed business ventures with actual returns from going businesses (GB 37) completely ignore the realities of business life. Every new venture involves a substantial risk against which must be weighed the most favorable estimates that its proponents suggest (R. 172, 1429, 1434). Thus, projected rates of return involve predictions of capital and operating costs and assume sales at plant capacity. Furthermore, in order for a new venture to improve the results of total operations, its projected rate of return must be in excess of the return on invested assets already committed.

The first of these considered the economics of a sodium chlorate plant at Calvert City, Kentucky, and showed an anticipated before-tax return in the range of 7-15 per cent (R. 259-60; PX 66, R. 634-35). This return was so unattractive that "the expense of refining these figures further would be unwarranted" (*ibid.*). Some additional studies were made in early 1956, but no proposal resulted (R. 261-62).

Hooker's announcement in December 1956 that it was going to increase the capacity of its Mississippi plant led the Pennsalt management to determine "once and for all" whether Pennsalt should construct a sodium chlorate plant in the Southeast (R. 263-64; PX 74, R. 639-40). After a series of cost and marketing studies (PX 96A, 96B, 96C, R. 652-85), the Pennsalt management met on December 5, 1957, to make a final decision concerning a Pennsalt sodium chlorate project in the East (R. 268):

> "Mr. Drake [the President of Pennsalt] asked all present two questions:
>
> "(1) Do we agree that it is unlikely in view of the capital requirements and relatively low return on investment that we alone would approve construction of an eastern chlorate plant?
>
> "(2) Would Olin-Mathieson be a logical partner?
>
> "The answer to both questions was yes." (PX 102, R. 692-93.)

Having decided that it was unlikely, then or in the future, that Pennsalt would approve construction of an eastern chlorate plant on its own, Pennsalt discussed with Olin the exploratory arrangement whereby Olin would act as Pennsalt's agent to sell up to 2,000 tons of sodium chlorate per year in the Southeast. Shipments were to be made from Pennsalt's Oregon plant which, because of a

recent expansion, had temporary excess capacity (48a). The arrangement was made on a year-to-year basis and continued in effect until Penn-Olin was formed in 1960 (47a-48a).

Subsequent to its December 1957 decision, Pennsalt considered a combined sodium chlorate-ammonium perchlorate project as a means of improving the anticipated rate of return from a southeastern plant (36a n. 22; R. 274-78). That project was never approved, however, because the demand for ammonium perchlorate did not develop as initially predicted (R. 279-80, 317-18, 344-45, 349).[9]

Reviewing Pennsalt's various considerations of a sodium chlorate plant and then of a combined sodium chlorate-ammonium perchlorate plant, the trial court concluded that Pennsalt never decided to proceed with a southeastern plant, "due primarily to the inability of the management to satisfy itself that the plant would be sufficiently profitable to meet the rate of return standard which it had established as a condition for new investments" (35a).

Olin

Although Olin never produced sodium chlorate commercially, it had extensive experience in the technical aspects of bleaching pulp and paper and valuable contacts with the pulp and paper mills in the Southeast.[10] Research personnel in Olin's Chemicals Division several times advocated that research on sodium chlorate be continued and

[9] In February 1959 Pennsalt completed a 2,000 ton ammonium perchlorate pilot plant at Portland, Oregon (R. 274-75, 282, 339-40), but an Assistant Secretary of Defense subsequently advised Pennsalt that the supply of ammonium perchlorate would exceed the demand until at least 1964 (R. 282; DX 2, R. 1504-05).

[10] Olin also purchased some sodium chlorate for its own use, but such amounts were stipulated to be insubstantial (29a n. 19), not "sizeable," as appellant now describes them (GB 4).

that building a plant be considered (R. 231), but Division management doubted whether they had developed adequate sodium chlorate technology (R. 231) and did not forward any such recommendation to corporate management until April 1959 (R. 169-70).

Each of Olin's seven operating divisions was required annually to advise Olin's corporate management of the division's forward thinking by a planning or "Whither" report. Since Olin's divisions all compete for corporate funds, they may not embark on capital projects without corporate management's approval of a separate capital appropriations request (R. 125-27).

The planning report submitted by the Chemicals Division in 1958 was the first to refer to sodium chlorate, but it simply included chlorates and perchlorates as products Olin did not make but in which the Chemicals Division was interested (PX 15, R. 510). The Chemicals Division made no specific recommendations with respect to those products (R. 169-70).

The Division's 1959 planning report did recommend a sodium chlorate project, but that recommendation was turned down at an April 1959 meeting of Olin's corporate staff (PX 34, R. 578; R. 131-33, 142-43). Corporate management was always dubious about the Chemicals Division's cost estimates (R. 172, 1267-68), just as Division management was always conscious of the need to temper their scientists' enthusiasm for new products with the uncertainties of plant construction and operation (R. 231). Although the project was reconsidered by the Chemicals Division later in 1959, that reconsideration was never discussed with corporate management (R. 133, 143).

In early 1960 when the joint venture proposal was broached to Olin's president, Mr. Osborne, he considered

whether Olin should proceed with its own sodium chlorate plant. To him the answer was clearly that Olin should not:

> "BY THE COURT:
>
> "Q. . . .You say a decision was made not to go alone. I take it that was in the context of a decision to go by the joint venture route?
>
> "A. Yes.
>
> "Q. Did you make any or face the question of whether if there was no joint venture in prospect or it was impossible for any reason, did you face the question of whether or not you would go it alone?
>
> "A. Yes, I did.
>
> "Q. What was your decision?
>
> "A. The answer was that we would not." (R. 142)[11]

Appellant accepts all the district court's findings of fact (GB 28); nevertheless, appellant's first argument is based on the assumption that both Pennsalt and Olin would have entered the southeastern sodium chlorate market if Penn-Olin had not been formed (GB 25, 29, 35, 36-41). The trial court specifically found to the contrary. It recognized that certainly both companies would not have simultaneously determined to build their own plants, and that a

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[11]Even after the February 11, 1960, letter of intent, the proposed joint venture—economically more attractive to Olin than a plant of its own—was rejected by Olin's corporate management because of its unsatisfactory projected rate of return (PX 409, R. 1429-30; DX 33, R. 1523-24). It was only after the projected rate of return was improved by eliminating packaging facilities and increasing anticipated production that Mr. Osborne ultimately approved it (PX 402, R. 1237-38; DX 42, R. 1528-36). There simply is no evidence to support the statement in appellant's brief that when Olin's management was re-appraising Penn-Olin "the prospects for independent entry by both Pennsalt and Olin were extremely favorable" (GB 41 n. 12; see PX 245, R. 836-37).

decision by one company to proceed with its own plant would affect the other's thinking. Finding that the record afforded no clue as to what action might have been taken in such a case, the court found:

> ". . . It is therefore impossible to conclude that as a matter of reasonable probability *both* Pennsalt and Olin would have built plants in the southeast if Penn-Olin had not been created." (39a)

2. There is no evidence to show a reasonable probability that, if either Olin or Pennsalt had entered the market, the other would have remained a significant potential competitor.

Alternatively, appellant argues that the formation of Penn-Olin prevented the competition that would have resulted if either Pennsalt or Olin had entered the market while the other remained a significant potential competitor, "threatening entry whenever market conditions offered a profit" (GB 35). That argument is not based on any evidence or finding of fact, but solely on what the trial court labeled "[t]he most favorable assumption that can be made from the Government's standpoint", namely the postulate "that one company would have decided to build while the other continued to ponder." (39a)

There is indeed no evidence that, if either Pennsalt or Olin had entered the southeastern market, the other would have continued actively to consider entry. As appellant admitted in its jurisdictional statement in this Court, "the record afforded 'no clue as to what action might have been taken if the problem had arisen'" (JS 18) and any such "prediction would have been a matter of sheer speculation, especially since '[n]either company had ever faced the problem'" (JS 17-18).

Despite protracted study, neither Olin nor Pennsalt had been able to convince itself that the southeastern market, in which Hooker and American Potash were then the only producers, was sufficiently attractive to justify independent entry (37a). Furthermore, "[t]he considerations which might induce one company to build its own plant when Hooker and AmPot were the only competitors would not necessarily be the same if a third competitor were about to enter the market" (39a). Thus, prior to the joint venture "Pennsalt was of the opinion that the southeastern market could handle only one more significant producer" (33a). As the district court found, by "1960 the southeastern market was not a deficit area" (20a) and "[t]he supply situation was to be further improved in December 1960 when AmPot's capacity at Aberdeen was increased by 7,500 tons" (20a n. 11; see 23a). The subsequent entry of PPG as a fourth competitor would have made the prospect even less attractive to Pennsalt or Olin.

In sum, there is nothing in the record or findings to show whether Pennsalt or Olin would have continued to consider entering the market if the other had already entered. Appellant's arguments about the ensuing benefits to competition are based on "sheer speculation" (JS 17), not a reasonable probability.

3. There is no evidence that the entry into the market of either Pennsalt or Olin alone would have resulted in greater competition than was produced by Penn-Olin.

Even if appellant had established the probability that but for Penn-Olin either Pennsalt or Olin would have entered the market alone and the other remained a potential competitor, it was still incumbent upon appellant to show that such a situation would have produced greater

competition than resulted from the formation of Penn-Olin. There was no showing to that effect.

Appellant now claims that it was erroneously foreclosed from making such a showing by what it describes as a holding of the trial court that "the government had the burden of showing a reasonable probability that '*both* companies would have entered the market as individual competitors if Penn-Olin had not been formed' " (GB 35). But the court below made no such holding. What really happened was that the court found no probability that both would have entered, and therefore never reached the question whether substantially more competition would have resulted if they had. The court then turned to a comparison between the impact on competition of the entry by Penn-Olin and separate entry by either Pennsalt or Olin, but it found no evidence upon which to base such a comparison. The Government had offered none and had advised the court that such a comparison was not appropriate under Section 7:

> "THE COURT: Let me ask you: If I should come to the conclusion that as a matter of reasonable probability, absent the joint venture, Olin would have constructed a factory and sold its products in the southeast, if I should come to that conclusion, does the Government contend that from that the Government must * * * win?"
>
> "MR. FREED: Yes."
>
> "THE COURT: Let me ask you: Isn't there a further question as to whether or not the construction of a plant by Olin, sales of products by Olin in the southeast, would have produced a more competitive situation than did the joint venture?"
>
> "MR. FREED: No, Your Honor, that would not be a legitimate question. It is not for the Government and it is not for the courts to weigh the advantages of combinations of competitors and what

they give to the economy, and what individual companies give to the economy * * * " (40a n. 25).

Consistent with that position, the Government did not introduce evidence that would permit a comparison between the impact on competition resulting from Penn-Olin and separate entry by either Pennsalt or Olin. Accordingly, the district court could only observe that, "[s]olely as a matter of theory, however, no reason exists to suppose that Penn-Olin will be a less effective competitor than Pennsalt or Olin would have been. The contrary conclusion is more reasonable." (41a-42a)

The Government now argues that competition is lessened because neither Pennsalt nor Olin is "waiting in the wings" (GB 48). But not having attempted to prove the extent to which such a situation would benefit competition, appellant now rests its argument entirely on speculation. Thus, it claims that "there can be little question as to the substantiality of the benefit to competition of having a capable, imaginative, and aggressive competitor waiting in the wings to enter an oligopolistic market" (GB 47-48) and asserts that "workable competition depends almost entirely" upon such favorable potential entrants (GB 49).

Appellant makes no attempt, however, to apply its reasoning to the facts of this case. It argued below that Allied Chemical, Wyandotte Chemicals Corporation, and Virginia Chemicals & Smelting Company (as well as Pennsalt, Olin, and PPG) had each considered entering this market (32a-33a).[12] Yet, despite the presence of those chemical companies "waiting in the wings", competition had been stagnant for a decade (GB 8-9). Thus, the lack of competition before Penn-Olin belies any benefits which appellant would now ascribe to Pennsalt or Olin as a potential entrant.

[12]Under appellant's present theory, Allied Chemical, Wyandotte Chemicals Corporation, and Virginia Chemicals & Smelting Company are still "in the wings", but appellant ignores that possibility.

We do not contend that the effect of potential competition should be ignored. Potential competition is concededly a factor to be taken into account, and its reduction or elimination may adversely affect actual competition in the market place. But the fact that it is potential does not make it more significant than actual competition.[13] Nevertheless, appellant argues (GB 24) that two potential competitors "plainly" are better than one actual competitor, and does not attempt the required analysis of the effect of potential competition in the relevant market.

In *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 321-22 (1962), this Court held that a merger must be "functionally viewed, in the context of its particular industry", in order to determine whether it may substantially lessen competition and made clear that a careful analysis must be made of the market involved and of the probable effects of the particular acquisition on that market.

Lacking the basis for such analysis, appellant urges that the joint venture is necessarily unlawful if both Pennsalt and Olin were (1) physically capable of entering the market, and (2) seriously considering such entry (GB 24). Without any authority to support that proposition, appellant's brief blandly asserts that such a joint venture would be prohibited "for much the same reasons that, in many circumstances, a company actively selling in a market may not acquire a significant potential competitor which is likely to enter that market". (GB 24) Just what the "same

[13] "No economist has said, so far as I know, that potential competition in the abstract is as good a force as actual competition. It would seem that actual competition in being would always be preferable. It is actual competition upon which the Clayton Act has always focused primarily. Anyone who takes the position that the elimination of competition not in being is as serious as elimination of actual competition must assume a heavy burden of proof." Professor James A. Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 A. B. A. SECTION OF ANTITRUST LAW REPORT 128, 136 (April 1958). (Footnotes omitted.)

reasons" are is left unexplained. Where one company already in the market acquires "a significant potential competitor" and there is no counter-balancing benefit in the relevant market, competition may well be lessened. *E.g., United States* v. *El Paso Natural Gas Co.*, No. 94, 1963 Term, U. S.; April 6, 1964. But where two companies, neither of which is in the market, jointly enter a new field, the effect on competition can be determined only by comparing the increase in competition from this new entry with the probable level of competition absent the joint venture.

The findings of the trial court, based on careful consideration of the evidence, establish that Penn-Olin brought about a marked increase in competition. It was the means by which the capabilities of Pennsalt and Olin were joined "to break into a market to challenge the supremacy of two companies which were dominating it" (27a-28a).

Appellant interviewed consumers of sodium chlorate, but failed to "introduce any testimony from purchasers of sodium chlorate who complained of any lessening of competition in the industry." (42a). Appellant also had interviewed and corresponded with the existing sodium chlorate producers and a number of other chemical companies, but "[i]n spite of this, no witness was called to testify that the vigor of competition in the sale of sodium chlorate had been, or is likely to be, lessened by Penn-Olin" (42a). On the contrary, appellant's witness, Mr. Dirksen, Eastern General Sales Manager of American Potash, testified that competition is "vigorous", that there had been "no lessening in competition since the establishment of Penn-Olin", and that he knew of "no facts likely to lead to a lessening in the future" (42a; R. 121-22).

The Government now seeks to remedy the lack of any evidence that Penn-Olin substantially lessened competition by attempting to shift the burden of proof:

> "Finally, even if it were relevant, the record is barren of any indication of benefits to competition from the joint venture that could compensate for and justify the lessening of competition which, as a matter of reasonable probability, the joint venture will cause." (GB 53)

That simply is not true. There was substantial evidence of the increase in the vigor of competition resulting from the entry of Penn-Olin into the southeastern sodium chlorate market (27a-28a; 30a-34a). And the trial court specifically found that the "advent of Penn-Olin, and later PPG . . . will in all likelihood increase the competition" and thereby benefit buyers of sodium chlorate and the public (43a).

Appellant would outweigh the positive and actual increase in competition which resulted from Penn-Olin with "sheer speculation" about "what might have been" if one company had entered the market and the other had remained a potential competitor (JS 17, 18). But there was no evidence of the effect on competition of such possibilities, nor any basis for comparing that effect with the actual increase in competition which resulted from the reality of Penn-Olin. There is ample evidence of more vigorous competition after Penn-Olin; it is the other half of the comparison that is lacking. "Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities." *Brown Shoe Co.* v. *United States, supra,* 370 U. S. at 323.

II

SECTION 7 OF THE CLAYTON ACT IS NOT APPLICABLE TO THE CREATION OF A NEW ENTERPRISE.

Appellant argues that the formation of Penn-Olin and the acquisition of its stock by Olin and Pennsalt constituted an acquisition "of another corporation engaged also in [in-

terstate] commerce" (GB 29). To reach this conclusion it argues that a corporation is engaged in interstate commerce if "it is either conducting an interstate business *or is intending or preparing to do so*" (GB 30, emphasis added). But the first paragraph of Section 7 requires the acquired company to be "engaged" in commerce, not "intending or preparing to do so". To make Section 7 applicable here, appellant tries to rewrite the statute.

Section 7 is and always has been concerned with the acquisition of existing business enterprises, not with the formal procedures of incorporation. When the Clayton Act was enacted in 1914, the then familiar pattern of acquisition of competing business enterprises was by way of the purchase of corporate stock and, accordingly, Section 7 in its original form prohibited only acquisitions of stock. *Brown Shoe Co.* v. *United States, supra,* 370 U. S. at 312-14. That limitation, however, made it easy to avoid the Section entirely by acquiring assets instead of stock, *FTC* v. *Western Meat Co.,* 272 U. S. 554, 561 (1926), and the 1950 amendment of Section 7 was designed primarily to plug that "loophole" by prohibiting the acquisition of assets as well as stock. *Brown Shoe Co.* v. *United States, supra,* 370 U. S. at 316.

In either case, however, the test of Section 7 application is whether the enterprise to be acquired is engaged in commerce—not whether a corporation formed as the instrumentality for the acquisition is itself engaged in commerce at the moment of its formation. *Aluminum Co. of America* v. *FTC,* 284 Fed. 401, 407-08 (3d Cir. 1922), *cert. denied,* 261 U. S. 616 (1923).

The significant fact about Penn-Olin is not that it "intended" to engage in commerce, but that it was formed to create a wholly new enterprise, rather than to acquire an existing business or any assets previously engaged in

commerce. Appellant concedes (GB 30) that the limitation of Section 7 to acquisitions of stock or assets of corporations engaged in commerce makes it inapplicable to the acquisition of a wholly intrastate firm. But a nonexistent enterprise is even farther removed from interstate commerce than one actually engaged in intrastate commerce.[14]

Appellant's suggestion (GB 33) that Penn-Olin was not a new enterprise, but was created to take over Pennsalt's existing interstate business in the Southeast is unsupported by the record. Pennsalt had not been able to compete effectively from its plant in the Northwest (21a, 24a), and Penn-Olin was a new enterprise formed to break into the southeastern market.

If in fact Penn-Olin had been formed to take over an existing business of either of its parent corporations, then the third paragraph of Section 7 (GB 30) would be applicable:

> "... Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition." 15 U. S. C. §18.

The test of illegality would then be whether the effect of the formation of Penn-Olin "is", rather than whether it

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[14] Appellant also appears to suggest that Pennsalt and Olin acquired an interest in a going business because they acquired the right to additional shares of the capital stock of Penn-Olin after the new venture was well launched (GB 30-31). That reliance is misplaced. From the very inception of the Penn-Olin venture, Pennsalt and Olin each owned one-half of it and neither acquired any further or different interest thereafter.

"may be", substantially to lessen competition. Since plaintiff has failed to establish even a probability of such lessening of competition, it cannot show an actual lessening. In this case, however, the record is clear that Penn-Olin was formed not to take over any existing business, but to create an entirely new enterprise and Section 7 is, therefore, inapplicable.

III

THE FORMATION OF PENN-OLIN DID NOT VIOLATE SECTION 1 OF THE SHERMAN ACT.

If Section 7 of the Clayton Act is not applicable, appellant must establish that the formation of Penn-Olin was a "combination . . . in restraint of trade or commerce among the several states" in violation of Section 1 of the Sherman Act. That section is narrower than the amended Section 7, which was intended to cover incipient restraints of trade outside the reach of the Sherman Act. *E.g., Brown Shoe Co.* v. *United States,* 370 U. S. 294, 318 (1962); *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 597 (1957).

Appellant asserts that Clayton Act standards of legality should be read into the Sherman Act; "that the more explicit policy of the Clayton Act be used to illuminate the general terms of the Sherman Act in situations where the former [latter?] statute is indisputably applicable . . . ." (GB 56). This would make Section 7, and especially its 1950 amendment, completely superfluous.

Since the 1950 amendment of Section 7 was intended to extend Section 7 beyond the limits of the Sherman Act (GB 54), and resulted from congressional dissatisfaction with the use of Sherman Act tests under Section 7, it is

not permissible for appellant now to reverse itself and apply the broadened Section 7 to "illuminate" Section 1.

In support of its position, appellant cites *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948). But the Sherman Act test of illegality there set forth (*id.* at 527), requiring examination of such factors as "the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market", is clearly not satisfied here. Nor may appellant derive any comfort from *United States* v. *First Nat'l Bank & Trust Co.*, No. 36, 1963 Term, U. S., April 6, 1964. In the present case no testimony was elicited as to any anti-competitive result of the formation of Penn-Olin, nor were Pennsalt and Olin "major competitive factors in a relevant market". *Id.* at 6-7.[15]

In any event, the issue here is whether the formation of Penn-Olin was anti-competitive, as the Government claims, or whether Penn-Olin increased competition, as appellees assert. If it did not "lessen competition" in a Clayton Act sense, it did not "unduly restrain competition" in a Sherman Act sense.

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[15] The two other cases relied upon by plaintiff are not relevant. In *Northern Pac. Ry.* v. *United States*, 356 U. S. 1 (1958), this Court did not refer to the Clayton Act, and reached a result based only on the Sherman Act. *Id.* at 8, 9. In *FTC* v. *Motion Picture Advertising Serv. Co.*, 344 U. S. 392 (1953), this Court was concerned with the application of Section 5 of the Federal Trade Commission Act and noted that "[t]he 'unfair methods of competition,' which are condemned by § 5(a) of the Act, are not confined to those that were . . . condemned by the Sherman Act." 344 U. S. at 394. The Court was not, as appellant asserted, reading Clayton Act standards into the Sherman Act.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

April 15, 1964

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APPENDIX

PX 1-375 were offered into evidence at R. 30-39 and were received into evidence at R. 62.

PX 376 was offered into evidence at R. 61 and was received at R. 62.

All portions of PX 377-411 which are referred to in this brief were offered into evidence at R. 44-59 and were received at R. 62.

PX 412-14 were offered and received into evidence at R. 62-66.

PX 415 was offered and received into evidence at R. 194-99.

PX 416-28 were offered into evidence at R. 418 and were received at trial transcript 824-25 (not printed).

DX 1-49 were offered into evidence at R. 417-18 and were received at trial transcript 824-25 (not printed).